

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/A-029

Between:

DERRICK LUNGU

APPELLANT

AND

CATHERINE CHANAKILA MWANZA

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

BEFORE : HON. G.C. CHAWATAMA - IN CHAMBERS

For the Plaintiffs : Mr. G. M. Kaulungombe- Messrs. Marshall Chambers

For the Defendant : Mr. N.K.R Sambo – Messrs Sambo Kayukwa and Company

JUDGMENT

Cases referred to:

1. *Imbwa v Imbwa SCZ Judgment No. 12 of 2003 (unreported)*
2. *Robert Simeza (suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) Motel Enterprises Limited (T/A Andrews Motel) Marianthly Noble Yolande Hadjipetrou v Elizabeth Mzyeche (suing as guardian Ad Litem of Minor Beneficiaries (2011) ZR Vol. 3.*

Authorities Referred to:

1. **Section 11(1) (b)**

This is an appeal against the decision of the Lands Tribunal delivered on 8th May, 2014. The Appellant appeals against the whole judgment of the tribunal on the following grounds:

1. *That the tribunal erred on both law and fact when it held that the 1st Respondent is rightful allocate or lessee of the property herein having followed the right procedure in acquiring the property when no such evidence was available before the tribunal.*
2. *That the tribunal erred in both fact and law when it ordered that the office of the Commissioner of Lands and/or the Chief Registrar of Lands and Deeds forthwith issues a certificate of Title in the 1st Respondent's name when there was still subsisting a valid certificate of title in the name of the Appellant though by an error of law, the entry at Lands and Deeds Registry showed that the same had been cancelled.*
3. *That the Tribunal erred in both fact and law in ordering that all the structures that have erected by the Appellant pursuant to the valid certificate of title be razed without any portion of blame on the authorities that issued the title deeds.*
4. *That the Tribunal erred in both law and fact to disregard the entries in the Commissioner of Lands and/or Registrar of Lands and Deeds that confirmed that the Appellant was the owner of the said land in dispute.*
5. *That the Tribunal erred in both law and fact to disregard the status of the validly issued certificate of title under Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*

Submissions against the appeal were filed on behalf of the 1st and 2nd Respondents on 22nd September, 2014 and 22nd July, 2015, respectively.

When the matter came up for hearing on 2nd September, 2015, Mr. Sambo, Counsel for the 1st Respondent informed me that both Respondents had filed their submissions and that he was informed by Counsel for the Appellant that he would argue the case but was not before court. Mr. Sambo made an application,

which I granted, that I proceed to make a judgment based on the documents on file.

It was contended on behalf of the 1st Respondent against the grounds of appeal that; in ground one the Tribunal relied on facts that were present before it through affidavits filed by both the 1st and 2nd Respondents. The Appellant did not file any affidavit to defend his position.

Counsel submitted that the claim before the Land Tribunal was that the Appellant had dispossessed her of and obtained a title to F/32a/E/H5, the property which belonged to the 1st Respondent herein through fraud. Further that the 2nd Respondent (Attorney General confirmed the fact that the 1st Respondent had been offered the property (paragraph 5 of affidavit filed on 21st March, 2014). Counsel further submitted that at paragraph 9 of the same affidavit, the 2nd Respondent stated that:

“Unknown to the Commissioner of Lands, there was another file in circulation which showed that F/32a/E/2/H5 was offered to Derrick Lungu.”

Counsel submitted that it was stated in paragraph 11 of the 2nd Respondent’s affidavit that:

“It came to light that the Commissioner of Lands acted on the basis of wrong information and as such, he proceeded to have the certificate of title issued to Mr. Lungu cancelled on 19th March, 2014.”

It was further submitted that the 2nd Respondent proceeded to cancel the certificate of title issued to the Appellant and informed him accordingly. That the 2nd Respondent also produced documents in its affidavit which indicated that the Appellant was involved in a fraud when he obtained title to the 1st Respondent's property. That the Appellant has never appealed against the cancellation of the fraudulently obtained certificate of title, but wants to pretend to the Court that there were no facts indicating that the 1st Respondent had followed the right procedure in acquiring her property.

It was further contended that the certificate of title fraudulently obtained by the Appellant was cancelled by the Registrar of Lands and Deeds on account of fraud before the decision of the Lands Tribunal.

In addition, it was submitted that the Appellant did not file any documents at the Lands Tribunal, despite having a legal representative who was advised to file an affidavit in opposition.

I have read Rule 12 of the Lands (Lands Tribunal) Rules and it indeed empowers the Tribunal to dispose off a matter before it by way of affidavit evidence when the Chairman of the Tribunal so orders. Another provision which the Lands Tribunal relied on was **Section 11(1) (b)** which provides as follows:

“The Tribunal may take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal.”

It is very clear from the judgment of the Tribunal (page J5) that the Appellant herein was accorded a fair opportunity to present his evidence through an affidavit in opposition but chose not to do so. Therefore the evidence that was before the Tribunal was that of the 1st and 2nd Respondents which to me was sufficient for the Tribunal to come up with its decision as it did.

In the case of ***Robert Simeza (suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) Motel Enterprises Limited (T/A Andrews Motel) Marianthly Noble Yolande Hadjipetrou v Elizabeth Mzyeche (suing as guardian Ad Litem of Minor Beneficiaries (2011) ZR Vol. 3.*** The court held that:

“No procedural injustice is occasioned when a party who is aware of the proceedings does not turn up.”

In that case the court cited the case of ***Imbwae v Imbwae SCZ Judgment No. 12 of 2003 (unreported)*** in which the court had a similar position when it held that:

“There is no procedural injustice occasioned when a Court proceeds, where there has been inaction on the part of a party despite being aware of proceedings.”

In view of the foregoing, I find that the appellant cannot now turn around and complain about the insufficiency of the evidence on which the Tribunal based its decision. The evidence was sufficient

from what can be seen from the judgment. Ministry of Lands which is the issuing authority in its affidavit evidence informed the Tribunal that the appellant's certificate of title to the land in disputed was obtained by fraud. I therefore find no merit in ground one.

In response to ground two, it was contended on behalf of the 1st Respondent that the Lands Tribunal did not err when it ordered the 2nd Respondent to forthwith issue a certificate of title in the name of the 1st Respondent. That there was no subsisting and valid certificate of title in the name of the Appellant during the time of the hearing of the matter as the certificate of title fraudulently obtained by the Appellant had been cancelled before the hearing of the matter, and the Appellant was aware of the cancellation.

The judgment at page J6 shows an excerpt of a letter which was written by the Chief Registrar to the then Acting Commissioner of Lands requesting him to cancel the certificate of title issued to the appellant citing grave illegality. The Tribunal relied on the print out which showed that the appellant's name was cancelled by the Chief Registrar on 19th March, 2014.

According to the memo exhibited in the judgment from the Lands Tribunal, the appellant's advocates were written to. This evidence was not disputed. There is therefore no merit in arguing that there

was a subsisting valid certificate of title in his name when the Tribunal ordered that the Commissioner issues a certificate of title in the 1st respondent's name. In fact, the Tribunal did even state in its judgment that if the appellant's certificate had not been cancelled it would have ordered that it be cancelled. Consequently grounds four and five which also relate to the subsistence of a certificate of title in the appellant's name of appeal fall off.

In response to ground three it was submitted that the Tribunal did not err at all when it ordered that the structures erected by the Appellant pursuant to the valid certificated of title be razed. This, it was contended, was because the Appellant obtained title to the 1st Respondent's property through fraud, and fraud vitiates any claim of legality for anything done on someone's property. The Appellant stole the 1st Respondent's property and rights. Further that he did not even have planning permission for whatever structures he wishes to lay claim to. It was further contended that if he wished to apportion loss it should be with the 2nd Respondent to the exclusion of the 1st Respondent.

I agree with Counsel for the 1st Respondent that the Appellant's title was vitiated on account of fraud. The undisputed affidavit evidence clearly shows that by the time the Appellant was obtaining title to the land, he was aware or ought to have been aware that the land belonged to the 1st Respondent having had obtained her title in January, 2001. Similarly, there was evidence

from the 2nd Respondent to the similar effect. The 2nd Respondent's deponent deposed that upon receiving a complaint from the 1st Respondent on 20th August, 2013 about the alleged trespass from the Appellant, an investigation was carried out which revealed that there are some illegalities in obtaining the title that he obtained. In the face of this evidence I do not find any merit in this ground as well. The issuing authority cannot bear the blame if the appellant allowed himself to be involved in a fraudulent act. Besides the right thing was done by carrying out an investigation after which the record was corrected.

It is open to the appellant to deal with specific individuals he dealt with at the Ministry of Lands concerning apportioning blame.

In total this appeal wholly fails for want of merit.

Leave to appeal is hereby granted should any party be unhappy with my decision.

DELIVERED AT LUSAKA THIS 7TH DAY OF JUNE, 2016.


G.C. CHAWATAMA
JUDGE